LABOR PRACTICES AS ANTITRUST VIOLATIONS: TRENDS IN BRAZIL AND WORLDWIDE

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I. Overview and Initial Remarks About Labor Related Conduct

Competition authorities around the world seem to have chosen a new target for antitrust investigations: the so-called no-poaching agreements and wage-fixing agreements, and the tendency is for the Administrative Council for Economic Defense ("CADE") to start examining the antitrust impacts of these agreements in Brazil.[1]

The most notably pioneering work was done by the US authorities, the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ"), which in October 2016 issued an Antitrust Guidance for Human Resource Professionals (the "US HR Guidance"), whose main objective is to warn about possible antitrust violations in the human resources area, especially agreements among human resources ("HR") professionals, business executives or other employees that could reduce competition for compensation, terms of employment or hiring new employees.[2] According to the US HR Guidance, an agreement among competing employers may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities.

The analysis on labor practice as possible antitrust violations shall take into consideration the employment marketplace as the competitive environment in which companies compete to hire and retain labor force (i.e., the idea of the employment marketplace as the relevant market affected by a potential infringement). In this regard, according to the US HR Guidance, from an antitrust perspective, "*firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services*". Moreover, just as the competition among sellers in an open

[1] In fact, agreements among employers aiming at limiting the recruitment/hiring or fixing the terms/values of wages and/or other benefits and elements that compose the compensation of their employees have increasingly gained space on the agenda of competition authorities. See, for instance, the discussions among the antitrust international community held during the Antitrust Spring Meeting of the American Bar Association ("ABA') and the GCR Live Annual Cartels, both in March 2019; the paper prepared by the Organization for Economic Co-operation and Development ("OECD") entitled "Competition Concerns in Labour Markets – Background Note"; and, more recently, the ABA International Cartel Workshop, in February 2020 (to name a few).

[2] Similar guidelines for labor-related practices have also been published, for example, by competition authorities from Japan ("Study Group on Human Resource and Competition Policy", February 2018) and Hong Kong ("Competition Commission Advisory Bulletin", April 2018).

marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation, the free competition among employers in the employment marketplace helps actual and potential employees through higher compensation, better benefits, or other terms of employment. Ultimately, end-consumers can also gain from the free competition among employers, considering that a more competitive workforce/workplace may motivate the creation and production of more and better goods/services.

But what are the labor practices that may come to be considered antitrust violations? As anticipated above, naked restrained agreements among employers for the purpose of (i) limiting and/or fixing salary or other terms/elements of compensation, either at a specific level or within a range (the so-called wage-fixing agreements) and/or (ii) refusing to solicit or hire employees from another company (the so-called no-poaching agreements) are the labor practices that may raise greater competitive concerns. In fact, the US HR Guidance establishes that naked wage-fixing and no-poaching agreements are considered *per se* illegal (i.e., unlawful by object) under the US antitrust laws and, therefore, subject to criminal prosecution in that country. On the other hand, according to the US HR Guidance, no-poaching agreements that are ancillary to corporate transactions (*e.g.*, the creation of joint ventures) or arising from vertical relationships (*e.g.*, franchises) may be analyzed by the so-called rule of reason, so that the potential unlawfulness of the practice will depend on the balance between the economic rationale of the practice and its actual or potential anticompetitive effects on the employment market.

In recent years, as it will be presented hereinafter, several companies have been investigated in the US for alleged no-poaching agreements, notably investigations involving tech-companies (Adobe, Apple, Google, Intel Intuit and Pixar), auto parts markers (Knorr-Bremse and Wabtec) and fast-food chains (Dunkin', Arby's, Five Guys and Little Caesars) - in such cases, the companies have entered into agreements with the authorities to cease the alleged misconduct.

Among other labor practices that can lead to antitrust exposure is the exchange of competitively sensitive information about terms and conditions of employment. In this regard, according to the US HR Guidance, "*[e]ven if an individual does not agree explicitly to fix compensation or other terms of employment, exchanging competitively sensitive information could serve as evidence of an implicit illegal agreement*". Nevertheless, differently from the naked wage-fixing and no-poaching agreements, according to the US Guidance, the exchange of sensitive information about terms and conditions of employment are not *per se* illegal under

the US antitrust laws and not subject to criminal prosecution in that country. Thus, it should be analyzed by the so-called rule of reason, depending on the specificities of each case.[3]

Still in relation to the US, it is worth mentioning that, on April 13, 2020, the DOJ and the FTC jointly released a statement[4] affirming that the antitrust agencies are vigilant for possible collusions or other anticompetitive conducts in the employment marketplace, even during the COVID-19 pandemic situation. This approach reinforces the seriousness and the importance given by the US authorities to the subject, even during exceptional periods. In this regard, the joint statement affirmed: "(…) *although there are many permissible ways that firms can engage in procompetitive collaboration, COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis*". The DOJ's Assistant Attorney General, Makan Delrahim, also mentioned: "*Even in times of crisis, we choose a policy of competition over collusion*".

In Brazil, there is still no formal guidelines/determination from CADE about no-poaching and/or wage-fixing agreements and, likewise, there are no specific provisions on the matter in the Brazilian Antitrust Law (Law No. 12.529/2011). Nevertheless, such labor related conduct can be object of antitrust scrutiny by CADE considering the overall anticartel framework in Brazil. In this sense, one may note that the Brazilian Antitrust Law broadly considers as antitrust violation any act that have as an object or may give rise to the following effects (even if not achieved in practice): (i) to limit, restrain or, in any way, injure free competition or the free market; (ii) to control the relevant market of goods or services; (iii) to arbitrarily increase profits; and (iv) to exercise a dominant position abusively.

In a broader sense, it is worth mentioning that in its Guidelines for Antitrust Remedies (October 2018), CADE recognized the importance of "key-personnel"[5] as one of the assets

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[3] In this sense, the US HR Guidance provides that information exchange may be appropriate if: (i) a neutral third party manages the exchange; (ii) the exchange involves information that is relatively old; (iii) the information is aggregated to shield the identities of the underlying sources; and (iv) enough sources are aggregated to prevent competitors from linking particular data to an individual source – which is similar to the approach/understand adopted by CADE on the matter involving information exchange, as presented in the final remarks of this brief.

[4] More information at: https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-jointly-issue-statement-covid-19-and.

[5] According to CADE's Guidelines for Antitrust Remedies, key-personnel is defined as the "*staff and managers, who are part or are permanently and independently requested in the operation of the divested business, and who holds key customers and suppliers contacts or have specific skills and know-how pertaining to R&D, IT, production, logistics, which are essential for the competitiveness of the business being divested*" (free translation into English).

necessary for the effectiveness of antitrust remedies. Furthermore, CADE's Guidelines for Antitrust Remedies also indicated that, when designing antitrust remedies, "*it is important to have references to the transfer of key-personnel or essential contracts with third parties, factors that may be crucial for the success of a new player in certain relevant markets*" (free translation into English).[6]

Although there is still no decision from CADE in cases involving cartel behavior exclusively based on labor matters, there are some investigations that dealt (or that are currently dealing) with some labor aspects (even if in a subsidiary manner), as it will be presented hereinafter. Moreover, given that CADE also takes into consideration the best practices adopted by foreign antitrust authorities, it is certain that this issue is already on the radar.[7]

Considering the relevance and novelty of such topic, below it will be presented some additional information about each practice (i.e., no-poaching agreements; wage-fixing agreements; and other labor related conducts) in light of the experience noted from antitrust authorities in Brazil, US and Europe on the matter (whenever applicable). Finally, it will be presented the conclusion and final remarks of this brief, especially in relation to Brazil.

II. No-Poaching Agreements

As explained above, no-poaching agreements (also referred as non-soliciting or cold-calling agreements) are understood as agreements among employers for the purpose of not accepting and/or not allowing the hiring of employees from another company. This type of agreement has been attracting great interest from public authorities from a while, especially in the US, and even before the release of the US HR Guidance in 2016. Below, this brief will provide an overview of the main cases related to no-poaching agreements, especially identified in Brazil, and complemented with the US experience.

In May 2010, CADE launched the Administrative Proceeding No. 08012.002812/2010-42 aiming at investigating alleged cartel behavior in the market of electronic recharge distribution for prepaid cell phones. The technical note that launched the investigation posed that, among other collusive practices (especially related to commercial rebates), the members

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[6] Additionally, in its Guidelines for Gun-Jumping Analysis (May 2015), CADE indicated employees' salaries as an example of potentially sensitive information (among others), in the context of information sharing among undertakings of a certain merger review.

[7] In this regard, in June 2019, Brazil submitted a paper to OECD, with the subject "Competition Issues in Labor Market – Note by Brazil", in which it expressly stated that "*unduly restriction of the salaries and mobility by a powerful employer (or a group of employers holding economic power) can be antitrust violations*". The paper is available at: https://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm

of the alleged cartel would have entered into no-poaching agreements in relation to each other employees. The document indicated that such type of practice could artificially restrict professional opportunities for the individuals who provided services to the investigated companies and ultimately reduce wages and job mobility. During the fact-finding phase, there was no evidence (including witnesses) corroborating such initial suspicions regarding the no-poaching agreement. In view of this lack of evidence, no conviction resulted from this no-poaching allegation. However, the fact that the alleged no-poaching agreement was also included/mentioned under the initial scope of the public investigation (among other cartel practices) is a clear indication that CADE is inclined to consider such conduct as a potential competition concern.

In July 2015, CADE formally launched the Administrative Proceeding No. 08012.003021/2005-72 aiming at investigating alleged cartel behavior among IT companies in public and private bids for the provision of IT services. The technical note that launched the investigation posed that, among other collusive practices, the defendants would have entered into no-poaching agreements and agreed not to hire employees from each other. The document also indicated that such practice could create artificial conditions in the employment marketplace, which could potentially aim at or result in keeping wages below average when compared to an environment with effective competition. This Administrative Proceeding is still under the scrutiny of CADE's investigative unit. Despite the lack of final decision to date, it is interest to note that, even in 2005, CADE was already attentive to such practice and considered it as a potential competition concern in its decision to start the public investigation.

More recently, in March 2018, CADE launched the Administrative Inquiry No. 08700.003187/2017-74 aiming at investigating alleged discriminatory practices and abuse of dominance position from certain banks against a Brazilian fintech named Nubank.[8] Among other practices, Nubank claimed that one of the banks "professionally harassed/prospected" several Nubank employees in a short period of time (practice identified as "solicitation", i.e., what would be the opposite of no-poaching), being the majority of these professionals systems developers with significant know-how about certain technologies developed by Nubank. According to Nubank, the harassment/prospecting of these employees would aim to weaken an essential area from Nubank, to impair its activities in the credit card issuing market. During the Administrative Inquiry phase, CADE investigative unit concluded that the arguments and

[8] The Administrative Inquiry, which is a facultative investigative phase prior to the official Administrative Proceeding, was initiated by CADE after a complaint from Nubank.

documents presented in the case records indicated that the "solicitation claim" brought by Nubank reflects a natural part of the professional framework in terms of prospecting different professionals in the employment marketplace. Therefore, CADE investigative unit dismissed such claim and, in April 2019, when formally opening the Administrative Proceeding against the banks to further investigate the other alleged discriminatory practices, the authority did not include the "solicitation practice" in the object of the Administrative Proceeding. Such case illustrates how CADE considers desirable the competition in the employment marketplace, reinforcing that no-poaching agreements could be considered a violation under the Brazilian competition framework.

In the US, federal antitrust agencies have filed several actions alleging that certain companies illegally agreed into no-poaching agreements. Notably, since 2010, the federal antitrust agencies have filed at least four (4) civil enforcement complaints against two or more companies under the allegation of anticompetitive no-poaching agreements, such as: (i) Knorr-Bremse and Wabtec (case 1:18-cv-00747); (ii) eBay and Intuit (case 12-CV-58690); (iii) Lucasfilm and Pixar (case 1:10-cv-02220); (iv) and Adobe Systems, Apple, Google, Intel, Inuit and Pixar (case 1:10-cv-01629). In these cases, the companies entered into agreements with the federal agencies to cease the alleged misconduct. On the state-level, US state enforcement agencies have been actively investigating and litigating potential no-poaching agreements, especially on the use of no-poach provisions in franchise agreements (which would prevent employees from seeking job opportunities at different franchises within the same chain). In this regard, several fast food chains have recently announced that they would agree to cease the use of no-poach provisions and amend their franchise agreements, including seven (7) chains in July 2018[9], eight (8) chains in August 2018[10], and, more recently, four (4) chains in March 2019[11]. The companies also entered into agreements with the authorities to amend their respective franchise contracts, removing clauses that would prevent franchisees from hiring employees from other stores in the same franchise. Lastly, in addition to these initiatives, there

[9] Including Arby's, Auntie Anne's, Buffalo Wild Wings, Carl's Jr., Cinnabon, Jimmy John's and McDonald's. More information available at: https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers.

[10] Including Applebee's, Church's Chicken, Five Guys, IHOP, Jamba Juice, Little Caesars, Panera Bread and Sonic. More information available at: https://www.atg.wa.gov/news/news-releases/ag-ferguson-eight-more-restaurant-chains-will-end-no-poach-practices-nationwide.

[11] Including Arby's, Dunkin', Five Guys, and Little Caesars. More information at: https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-multistate-settlements-targeting-%E2%80%9Cno-poach%E2%80%9D.

were reported several civil class actions against such investigated companies, especially filed by employees who allegedly felt harmed by such no-poaching agreements/constraints.

During ABA 13th International Cartel Workshop[12], it was mentioned that, on the European community level, the European Commission ("EC") and the Federal Cartel Office ("FCO") apparently have not handled cases specifically regarding no-poaching agreements yet and, thus, no fines for such arrangements have been imposed. Nevertheless, it was pointed out that National Competition Authorities around the European community may have dealt with no-poaching agreements related issues on their respective member States level (notably, Germany, Croatia, France, Netherlands and Turkey).

In view of the peculiarities of such labor practice and the enforcement actions adopted in the US, it will be interesting to monitor how CADE will deal with the matter, mainly related to possible vertical restraints (*e.g.*, per se vs. rule of reason).

III. Wage-Fixing Agreements

As mentioned above, wage-fixing agreements are those anticompetitive collusions/arrangements among employers that aims at limiting and/or fixing salary or other terms/elements of compensation, either at a specific level or within a range. According to the US HR Guidance, "*[e]ven if an individual does not agree orally or in writing to limit employee compensation or recruiting, other circumstances – such as evidence of discussions and parallel behavior – may lead to an inference that the individual has agreed to do so*". Some cases involving wage-fixing agreements were reported in the US HR Guidance. The summary of those cases is presented below, demonstrating that such topic has been subject of analysis by the US authorities since the 90's, although the recent antitrust guidelines on the matter.[13]

In 1992, the FTC sued managers of nursing homes in the city of Rockford, Illinois, who colluded to prevent a temporary employment agency from raising the price of the services of outsourced nurses (case *U.S. v. Debes Corp*). The collusion among such nursing homes eliminated the natural competition in the procurement of nurses' services, creating a type of price control in relation to such specialized labor-force. At the end of the process, the parties settled with the FTC, without the admission of guilt, and the nursing homes agreed in ceasing

[12] The conference was held between February 19-21, 2020, in San Francisco, California, USA.
[13] Additional information on the following cases (including other relevant information) can also be found in the article "*O Improvável Encontro do Direito Trabalhista com o Direito Antitruste*" (Amanda Athayde, Juliana Domingues and Nayara Mendonça), published in IBRAC's magazine (vol. 24, 2018).

the investigated conduct. The parties were also prohibited from exchanging any type of information about the use of temporary nursing services with the other investigated companies.

In 1994, the DOJ investigated the Utah hospitals trade association and the Utah hospitals' HR directors association (in addition to the affiliated hospitals of these associations) for alleged agreements aiming at stabilizing the compensation paid to nurses in that region (case *US v. Utah Society for Healthcare Human Resources*). The conduct, which allegedly took place between 1984 and 1992, mainly consisted in the exchange of confidential information about the general budget of hospitals, the budget dedicated to the payment of nurses and the initial salary of newly graduated nurses. According to the DOJ, during the period of the conduct, the state of Utah faced a severe decrease in the offer of nurses' labor-force, which was not naturally accompanied by the promotion of the salaries paid to the professionals in the field (i.e., offer vs demand). At the end of the process, the parties settled with the DOJ and agreed not to enter into agreements about fixing current or future nurses' salaries, and not to exchange information regarding compensation with competitors.

In 1995, the FTC investigated an alleged wage-fixing agreement that aimed to reduce the fees paid to models at certain fashion shows (case *US v. Council of Fashion Designers of America*). At the time, some designers joined together to produce 2 (two) fashion shows per year and, in this context, agreed on sharing costs and making collective purchase of services. The FTC questioned the legitimacy of the designers' agreement to fix the remuneration of the models. The claim was based on the fact that such agreement did not have any relationship with the management of the fashion shows, in addition to the fact that the hiring of models used to be done individually by each designer (and not by all together). At the end of the process, the parties settled with the FTC, in which the Council of Fashion Designers of America committed to prevent its members from fixing the models' fees and to advocate in relation to the designers in the sense that agreements on price/wage-fixing raise serious competitive concerns.

There are still no specific public cases in Brazil related to wage-fixing agreements, but based on the exposed herein it is possible that CADE will adopt a similar position in relation to horizontal wage-fixing agreements in the sense to be perceived as a cartel behavior.

IV. Other Labor Related Conduct (the Brazilian Experience)

Further to the more defined labor practices that could raise competition concerns (*i.e.*, no-poaching and wage-fixing agreements), there are other practices connected with labor matters that are also calling the attention of the antitrust authorities. This is the case of the exchange of

sensitive information related to labor matters and employment marketplace, for instance. That is, even in the absence of formal agreements among employers related to labor aspects of the employment, certain practices still have the potential to give rise to competitive concerns.

In this sense, in September 2016, CADE launched the Administrative Proceeding No. 08700.006386/2016-53 to investigate the exchange of sensitive information, including, among several others, information about commercial structure (such as the number of employees and their wages and benefits) in the auto parts aftermarket. The case is still under the scrutiny of CADE's investigative unit and it will be interesting to see whether CADE will take a specific position on the labor aspect.

Another labor practice that is calling the attention from CADE is related to the possible use of Collective Labor Convention[14] to restrain competition. More recently, in February 2020, CADE launched the Administrative Inquiry No. 08700.005683/2019-24, to investigate the gyms trade union from the State of Rio de Janeiro (SINDACAD/RJ) on alleged conduct that created artificial barriers for regular activities of gyms that operate in the business model known as "low costs/low fare"[15]. Specifically, SINCAD/RJ would have included in the 2019/2020 Collective Labor Convention a clause that limits the number of students/clients that each teacher/physical education professional can supervise (i.e., in practice, establishing a minimum number of professionals per student).

It is worth noting that, in 2013, CADE already had convicted SINCAD/RJ for a similar practice (Administrative Proceeding No. 08012.005524/2010-40), in which CADE concluded that SINDACAD/RJ could not use its trade union prerogatives to influence whether or not a particular business model could prosper. Furthermore, at that time, CADE understood that the insertion of a regulatory clause in a Collective Labor Convention was an attempt to undermine the regular activities of gyms that adopt the "low cost/low fare" business model, also seeking to protect private interests and other enterprises. The new Administrative Inquiry is still under the scrutiny of CADE's investigative unit, although an injunctive relief was already granted to suspend the effects of the controversial clause in the 2019/2020 Collective Labor Convention. Such case reinforces the links between antitrust and labor matters.

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[14] Collective Labor Convention is a way of pacifying collective labor disputes that may have economic (e.g., claiming new working conditions or better wages) and/or legal (e.g., declaration of the existence or the non-existence of a controversial legal relationship) natures. The terms established in the Collective Labor Convention will be applied to all undertakings linked to a certain professional category (art. 611 of the Brazilian Labor Law).
[15] CADE initiated the investigation following a complaint from a chain of gyms named SmartFit, which operates in Brazil by means such business model of "low cost/lost fare".

V. Conclusion and Final Remarks

As seen above, labor practices that have the potential to impair and limit the competition in the employment marketplace (especially horizontal agreements among employers) have increasingly gained space on the agenda of competition authorities. Naked no-poaching and wage-fixing agreements (in the sense of cartel behavior) seem to be the labor practices that shall give rise to greater competitive concerns (without prejudice to other related practices/issues).

In Brazil, there is still no formal guidelines nor ruling from CADE about no-poaching and/or wage-fixing conduct, but the cases initiated involving such matter (even partially) demonstrate that the authority is attentive to such practices. Also, in the recent contributions from Brazil to OECD in relation to competitive issues in labor markets, the Brazilian committee already acknowledged that special guidelines related to labor practices (targeting merger reviews and behavioral conduct) seem to be effective both for antitrust and social purposes.

In this regard, the following topics presented by the Brazilian committee to OECD can be seen as the most recent and formal guidance on labor-antitrust related aspects in respect to Brazil:

(1) employers should inform and train employees with HR responsibilities to understand the fundamentals of the antitrust framework;

(2) employers shall not enter into written or verbal agreements on (a) remuneration (or other employment-related terms) or (b) recruitment of employees with professionals from competing enterprises;

(3) when sharing confidential employee information, in the context of merger reviews, companies should consider (a) using a third party (neutral agent) to manage data exchange, (b) anonymize data (by presenting them by position or aggregate), and (c) limit access to such data or information; and

(4) companies should ensure that the non-competition provisions in the transaction documents are business fit and reasonable in duration and scope.

In view of such discussions, it will be interesting to observe how antitrust authorities around the world, especially CADE, will enforce the law in relation to the labor practices and how this will impact the structure and operation of HR departments/professionals and employers in their businesses.